FILE COPY.

Office Supreme Court U.S.
FILED
DEC 21 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANTS,
v.
MARY K. WHEELER, ADMINISTRATRIX of Stephen Wheeler, deceased. } No. 199.

APPEAL FROM THE COURT OF CLAIMS.

APPELLANTS' BRIEF.

LOUIS A. PRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

18528

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANTS,
v.
MARY K. WHEELER, ADMINISTRATRIX OF Stephen Wheeler, deceased.
No. 199.

APPEAL FROM COURT OF CLAIMS.

APPELLANTS' BRIEF.

STATEMENT OF CASE.

Stephen Wheeler was clerk of the United States courts for the western district of Arkansas during the time the services claimed for in this suit were performed. In the settlement of his accounts as such officer, certain disallowances were made by the accounting officers of the Treasury Department. Suit was brought therefor in the Court of Claims, and prosecuted by his administratrix, the appellee. Judgment was rendered in favor of said appellee. From this judgment the United States appealed. The claimant below made application for appeal from said judgment, which application was allowed, although the amount of the judgment was less than $3,000.

The questions raised by these respective appeals are, first, as to the validity of the judgment against the United States on certain of the findings of facts, which will be specifically designated in the assignments of error, and, second, as to the jurisdiction of the court to consider the appeal of the claimant.

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the appellant on item 3 of Finding IV of the findings of fact (transcript, p. 8).

2. In rendering judgment against the appellant on item 7 of Finding IV of the findings of fact (transcript, p. 8).

3. In rendering judgment against the appellant on item 8 of Finding IV of the findings of fact (transcript, p. 8).

4. In rendering judgment against the appellant on item 15 of Finding IV of the findings of fact (transcript, p. 9).

5. In rendering judgment against the appellant on item 17 of Finding IV of the findings of fact (transcript, p. 9).

ARGUMENT.

The charge under item 3, referred to in the first assignment of error, is for administering oaths to witnesses for defendants on trial.

The finding shows that the court gave oral direction or order to the clerk to perform this serv-

ice. It does not follow from this fact, however, that the United States is bound to pay for said service. In the progress of the trial, when the State rests, it is in order to swear the witnesses for the defendant. The court very properly indicates when that step shall be taken by addressing the clerk thus: "Swear the witnesses for the defense," or in words to that effect. Suppose the clerk should proceed to do this without waiting for the suggestion or order from the court. Would it shift the liability for fees for said oaths? Is the so-called order of the court necessary to charge the United States with the payment of the charges for this service? We think not. Either the United States is chargeable with this service under its general liability to the clerk for his services, in conformity with the fee bill, or it is not liable at all. The so-called order of the court can have no effect either one way or the other in fixing liability for said service.

There is a well-established doctrine that defendants must pay their own costs; that is to say, fees for all services performed at the instance and request of defendant must be paid by him, or at least charged to him. There is only one exception to this rule, and that is to be found in section 878, Revised Statutes. There is nothing in the findings of fact to show that the defendants for whom these witnesses were sworn were adjudged indigent in accordance with the provisions of said

section. This section, we claim, is exclusive, and clearly indicates an intention on the part of Congress to prohibit the payment of all other charges against the United States for services rendered for defendants. It is a well-settled rule of construction that what is expressed in a statute is exclusive where some power or privilege is granted by the statute. (Sunderland on Statutes and Statutory Construction, par. 325 et seq.) This section is creative of a right—a privilege extended to indigent defendants. The statute certainly shows that Congress recognized and approved the doctrine that the United States is not chargeable with the costs incurred by defendants, otherwise legislation in behalf of indigent defendants would have been unnecessary.

Swearing defendant's witnesses is as much a service rendered at the instance and request of defendant as is the issuance of subpœna for those selfsame witnesses. It certainly can not be said that the Government would be liable for the latter service unless the defendants have been brought within the provisions of section 878. (See *United States* v. *Dundy*, 76 Fed. Rep., 357.)

The charge under item 7, referred to under the second assignment of error, is for administering oaths of poverty to indigent defendants, under section 878, Revised Statutes, and for affixing jurats to said oaths or affidavits.

Said section provides for the payment of the

"costs incurred by the process and the fees of the witnesses" in the cases of indigent defendants. According to the plain reading of this statute, the Government's liability for the costs does not begin until the court has ordered process to be issued for defendant's witnesses under said section. This would, of course, exclude charges for preparing affidavits of poverty, and consequently for affixing jurats thereto. If the United States is liable at all for the charge of preparing said affidavits, it is liable in cases where the application is refused, as well as in cases where it is granted. It will hardly be contended that the United States should pay for preparing these affidavits in cases where the defendant's application for process is not granted by the court. (2 Comp. Decs., 224; *Dundy case*, 76 Fed. Rep., 357.)

The charge under item 8, referred to in the third assignment of error, is for filing and entering the applications of defendants for process under section 878.

This charge is open to the objection stated to the preceding one. It is not seen that there was any necessity for a formal application for process under said section, aside from the affidavit of poverty. However, that is a matter of practice, which is not in question in this case. It is perfectly plain, though, that if an application were made to the court it should be filed before any action was taken thereon. It follows, therefore, that the charge for

filing such an application might, under some circumstances, be made in cases where the application was refused. Plainly, it is not a charge coming within the classification of charges allowed in cases of indigent defendants under section 878.

The charge made under item 15, referred to in the fourth assignment of error, is for filing and entering motions of indigent defendants for new trial.

This charge is claimed under authority of section 878, Revised Statutes. The defendants filing said motions for new trial had been regularly and duly declared indigent. It is our contention, however, that the fee for filing said motions was one chargeable to the defendants, not falling within the class of fees which the Government undertakes to pay in such cases. (*Dundy case*, 76 Fed. Rep., 357.)

The charges made under item 17, referred to in the fifth assignment of error, are for services performed at the instance and request of the defendant in a criminal case in the matter of the prosecution of a writ of error from the Supreme Court of the United States under the provisions of the act of February 6, 1889 (25 Stats. L., — 655).

The defendant in said case had been regularly adjudged indigent by the trial court. The services were rendered by direction of the court. However, it was entirely unnecessary for the court to direct the performance of said services [illegible]

plainly declares it to be the duty of the clerk to certify and transmit to the Supreme Court a transcript of the record in such case.

What has been said with reference to the provisions of section 878, Revised Statutes, in connection with the preceding items is applicable here. Said charges clearly fall outside the fees agreed to be paid by authority of said section. However, it was urged in the trial below that the United States is chargeable with the costs and expense of making transcripts and filing and entering papers in connection with writs of error sued out by indigent defendants in capital cases by the provisions of section 6 of the act of 1889. Said section provides:

> That hereafter in all cases of conviction of crime, the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be reexamined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right, and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error it shall be the duty of the clerk of the court to which the writ shall be directed to forthwith transmit to the clerk of the Supreme Court of the United States a

certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file, and docket the same.

It will be observed that this section fails to provide that any of the costs incurred by the respondent shall be paid by the United States or that the United States shall under any circumstances be liable for such costs. The gist of the statute is the granting of the right to sue out the writ of error, and, for the purpose of giving to the person convicted of a capital offense every opportunity for carrying his case to the highest tribunal of the land, provision is made excluding him from the usual requirement of giving bond to save the United States harmless from all costs in case his suit in the Supreme Court should fail as required by section 1000, Revised Statutes. The act of 1889 simply relieves the respondent of this requirement, and permits him to carry his case to the Supreme Court without the necessity of securing the costs to the United States. Inasmuch as it is always assumed that the defendant pays his own costs as they accrue, subject to the exception provided in section 878, it is clear that the costs which the respondent is required by said section (1000, R. S.) to secure are only the costs which the United States would be compelled to make in following the proceedings in error. Certainly nothing in the act of 1889 can be said to express or imply an intention on the part of Congress that the

United States should pay the costs incurred by defendants in criminal cases in prosecuting suits on error in the Supreme Court.

The fact that the clerk of the trial court and the clerk of the Supreme Court are required to perform certain duties in connection with the allowance of such writ and the prosecution of same does not, of itself, establish their right to compensation therefor. Compensation is not given for every service required of an officer who receives his compensation by fees. Attorneys at the bar are frequently called upon in the Federal courts to defend indigent prisoners, and they must do so without compensation from the United States. There is no good reason why a clerk of the court should not, by the same token, be required to contribute his services under such circumstances. (See *United States* v. *King*, 147 U. S., 676; *United States* v. *Patterson*, 150 U. S., 65–69; *United States* v. *Shields*, 157 U. S., 88–91.)

This brings us to the consideration of claimant's appeal. It is proper to say in this connection that no objection was offered to the allowance of claimant's application for appeal. We were willing then and are willing now to have the matters complained of presented to this court for its decision, if it can be done in accordance with law. However, upon examination of the subject it seems to us that the application of the claimant below for appeal was improperly allowed, and that

this court is without jurisdiction in the premises. One of the conditions upon which the United States consents to be sued in the Court of Claims is that the claimant shall not have the right to appeal unless the amount of the judgment in the case exceeds $3,000. The amount of the judgment in the case at bar was only $619. Therefore, we say, this is a jurisdictional question.

The rights of the parties in the Court of Claims to appeal are to be determined by this court. (*Adams case*, 6 Wall., 101; *Walsh case*, 23 C. Cls. R., 1.) Under the statute (section 707) it is clear that the claimant below had no right of appeal. Neither can he assign error on the appeal taken by the United States. (*Hickey case*, 17 Wall., 9; 8 C. Cls. R., 114.) There is nothing before the court for consideration except the matters assigned as error by the appellant. The claimant below is not the appellant, and, manifestly, can not be.

LOUIS A. PRADT,
Assistant Attorney-General.

PHILIP M. ASHFORD,
Special Attorney.

O

1853

FILE COPY.

1853

Office Supreme Court
FILED
JAN 4 190
JAMES H. McKENNEY,
C

Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, *Appellant*,
vs.
MARY K. WHEELER, *Administratrix of Stephen Wheeler, Deceased.* } No. 199.

MARY K. WHEELER, *Administratrix, Appellant*,
vs.
THE UNITED STATES, *Appellee.* } No. 525.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR MARY K. WHEELER, ADMINISTRATRIX.

CHARLES C. LANCASTER,
Counsel for Administratrix.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9171

Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, *Appellant*,
vs.
MARY K. WHEELER, *Administratrix of Stephen Wheeler, Deceased.* } No. 199.

MARY K. WHEELER, *Administratrix, Appellant*,
vs.
THE UNITED STATES, *Appellee.* } No. 525.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR ADMINISTRATRIX.

Statement of Facts.

This is an appeal by the United States from a judgment of the Court of Claims in favor of the claimant, and a cross-appeal by the claimant. The appeal by the United States assigns errors to items 3, 7, 8, 15, and 17 of the findings of fact, which, as shown by the record (pp. 8, 9), are as follows:

"Item 3. For administering oaths to 587 witnesses for defendants, to testify in various criminal cases on trial, by oral order of the judge, at 10 cents each, $58.70.

"Item 7. For administering oaths at 10 cents each and drawing jurats, at 15 cents, to affidavits of indigent defendants to have their witnesses summoned at the expense of the United States under section 878, Rev. Stats., $36.20. This service and charges were approved by the court, and have

always been allowed by the accounting officers of the Treasury until recently.

"Item 8. For filing and entering written applications of indigent defendants to have their witnesses summoned at the expense of the United States, at 10 cents each, and entering orders of court granting the same, at 15 cents per folio, $30.45. This service and charges were approved by the court; * * *

"Item 15. For filing and entering 17 written motions of indigent defendants, under section 878, Rev. Stats., for a new trial, at 10 cents each, and entering orders of court overruling the same, one folio each, at 15 cents per folio, $2.30.

"Item 17. For filing and entering separate bills of exceptions, assignments of error, petitions for writs of error, entering on docket orders of the court thereon, orders of court to stay judgments, issuing of citations and writs of error, and for making transcripts of record for the Supreme Court of the United States in certain capital cases under the act of February 6, 1889, at 10 cents for filing and entering each paper, and 15 cents per folio for entering orders and making transcripts, $619.30.

"The defendant in each case filed with the clerk of the court a poverty affidavit stating his inability to pay the costs of the proceedings for the writ of error. The services were rendered by direction of the court, and the charges have been approved by the court in the accounts of claimant, as required by the act of February 22, 1875."

BRIEF OF ARGUMENT.

Item 3. The court below found, and it is admitted by counsel for appellant, that the claimant administered these oaths to witnesses for defendants to testify in criminal trials by ORDER OF THE COURT.

This being conceded, the law of the case is plain and settled.

The statute authorizing these fees is section 828, Revised Statutes, clause 4, which provides:

"For administering an oath or affirmation, except to a juror, ten cents."

When these oaths are administered to witnesses for the defendant in a criminal case by order of the court, it is the *duty of the clerk of the court to obey* said order, and the fees are chargeable to the United States, for the reason that the order is mandatory, and leaves the clerk of the court no option to disobey said order until his fees are paid by the defendant. Under the order of the court, the service rendered by the clerk of the court is for the benefit of the United States, as the defendant is legally presumed to be innocent until proven guilty. The legal effect of this order has the same force as a statute authorizing compensation.

This court has sustained this point in the following language:

"When the clerk performs a service in obedience to an order of court, he is as much entitled to compensation, as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services" (U. S. *vs.* Van Duzee, 140 U. S., 177, item 10).

Similar conclusions of law were announced by this court in the following cases:

U. S. *vs.* Barber, 140 U. S., 164, item 3.
U. S. *vs.* Jones, 147 U. S., 674, item 2.
U. S. *vs.* Payne, 147 U. S., 689, item 2.

Counsel for defendant relies on section 878, Revised Statutes, but that section has no application here for the reason that the witnesses for the prisoner were in court, and process was not necessary to bring them. The distinction is obvious and controlling.

The court below found in its III findings of fact that the accounts of claimant containing these services were presented to the United States court for approval, and orders approving the same as being just and according to law were entered of record, as required by the act of February 22, 1875 (18 Stats., 333).

In construing the legal effect of this approval this court said:

"The approval of a commissioner's account by a circuit court of the United States, under the act of February 22, 1875 (18 Stats., 333), is *prima facie* evidence of the correctness of the items of that account, and in the absence of *clear and unequivocal proof of mistake on the part of the court, it should be conclusive.*"

U. S. *vs.* Jones, 134 U. S., 483.

Items 7, 8, and 15 are similar in fact and law, and the services are authorized by sections 828 and 878, Revised Statutes. Counsel for appellant contends that the claimant has charged for preparing affidavits of indigent defendants, and that such charge is illegal. The record fails to sustain this contention. The charges made and here claimed are for administering oath and drawing jurat to the affidavit, filing same and entering orders of court granting the application for process, but no charge is made for drawing the affidavit. The service is clearly within the benign provisions of section 878 of the Revised Statutes, and this interpretation of the section was sustained by the United States court which approved the charges in the accounts of claimant.

The indigent defendant being unable to pay any costs, as shown by the fact that the court allowed his application for process at the expense of the United States, it was the duty of the clerk to perform this service for the benefit of the United States, and in the interest of substantial justice, as fully contemplated by the scope and purpose of section 878 of the Revised Statutes.

The charges for filing written motions of indigent defendant for a new trial and entering orders of court overruling the same are within the same scope of the above section, and the United States is liable for the cost. This construc-

tion was placed on this section by the accounting officers of the Treasury, as the court below found the following facts:

"This service and charges were approved by the court, and *have always been allowed* by the accounting officers of the Treasury until recently."

This long-continued practice, of itself, should settle the controversy in favor of the appellee.

U. S. *vs.* McDermott, 140 U. S., 151, item 3.
U. S. *vs.* Finnell, 185 U. S., 236.

Item 17. This service was performed in strict compliance with the provisions of section 6 of the act of February 6, 1889 (25 Stats., 656). As this section is printed in full in appellant's brief, it is omitted here.

The act specially provides that: "Every such writ of error shall be allowed as of right, and without the requirement of any security for the prosecution of the same or for costs."

This provision clearly makes it obligatory upon the United States to pay the clerk for his services incident to this writ of error, as it distinctly deprives the clerk of any remedy against the defendant to secure his costs. Under this act the United States requires the clerk to perform this service in the interest of justice, and it assumed all liability for the costs of the proceedings. It would be contrary to all reason and fairness to assume that the United States required the clerk to perform this important and onerous service without compensation. To say that the defendant should pay this cost is answered by the fact that each defendant filed with the clerk a poverty affidavit, showing his inability to pay the cost of this proceeding. The service being mandatory on the clerk by positive statutory enactment, and by direction of the court, it was performed for the benefit of the United States and the United States should pay for it. The fees are clearly authorized by section 828, Revised Statutes.

This view of the statute was taken by the United States court, which approved the accounts of claimant containing the services and fees here claimed. The legality of the services and charges are fully established by the following authorities.

In the Van Duzee Case, 140 U. S., 177, this court said:

"When the clerk performs a service in obedience to an order of court, he is as much entitled to compensation as if he were able to put his finger upon a particular clause of a statute authorizing compensation for such services."

In this case the compensation is specially provided for in section 828 of the Revised Statutes.

In the Jones case, 147 U. S., 675, item 2, this court, in passing upon the legal effect of the order of court requiring its clerk to perform certain services, held:

"The account in question is clearly within this section. Supposing it, however, to be a question of doubt, if the court assumed jurisdiction to make such order, and the clerk obeyed it by entering it upon the journal, he is entitled to his fee therefor, irrespective of the necessity of such order being made. In fact he would be guilty of contempt in refusing to make such entry. The Government cannot, in this collateral proceeding attack the power of the court to make this order."

Counsel for appellant contends that the clerk of the court should perform this service without compensation and cites U. S. *vs.* King, 147 U. S., 676; U. S. *vs.* Patterson, 150 U. S., 65; U. S. *vs.* Shields, 153 U. S., 88.

The point in the King case was that there was no law providing a fee to the clerk acting as jury commissioner, and he was not entitled to extra compensation.

The same point was made in the Patterson case that the fee bill did not provide a *per diem* to a commissioner of the circuit court for hearing and deciding charges by a com-

plaining witness to determine whether a warrant should issue.

The point in the Shields case was that the fee bill did not authorize compensation to a district attorney for travel in going to his home every Saturday and returning to court the following Monday, during the continuous session of the court.

It will thus be seen that neither of these authorities has any application to the present case, for the very obvious reason that in the present case every service and charge made is distinctly and specifically provided for by the fee bill (section 828, Rev. Stats.).

If there were any service or charge herein claimed which is not provided by the fee bill, counsel for appellant has entirely failed to set it up in the record, and therefore his contention must be overruled.

APPEAL OF CLAIMANT.

STATEMENT OF FACTS.

This is an appeal by the claimant in the nature of a cross-appeal from the judgment of the Court of Claims on items 4, 9, and 13 of the findings of fact, which are as follows:

"Item 4. For administering oaths to 340 persons summoned to serve as grand and petit jurors before examination by the court to determine their qualifications for service as jurors, at 10 cents each, $34.00. These oaths were administered by order of the court. The person to whom the oath was administered was not a juror when sworn, but the oath was administered to test his qualification to serve as a juror. No charge is claimed for oath to a person after he has been accepted as a juror."

"Item 9. For drawing certificates to copies of *sci. fa.* to be served by the marshal on defendants, at 15 cents each, $3.00. It is the practice of this court to serve certified copies

of process, and the services and charges have always been approved by the court. *No order of court shown.*"

"Item 13. For drawing certificates to certified copies of orders of the court for marshal to furnish meals to jurors at the expense of the United States, at 15 cents each, $6.30. No order of court shown."

ASSIGNMENTS OF ERROR.

The Court of Claims erred:

1. In rendering judgment against the claimant on items 4, 9, and 13 of claimant's petition on the findings of fact by the court.

2. The refusal of said court to render judgment in favor of the claimant for the amounts claimed in said items.

BRIEF OF ARGUMENT.

Objection is made by counsel for the United States to the jurisdiction of this court to consider this cross-appeal. But this objection can have no force for the following reasons: The principal appeal and the cross-appeal are to be taken as one appeal. It cannot be disputed that the court has jurisdiction of the Government's appeal, since there is no limit placed by law upon the amount involved when an appeal is taken by it from the Court of Claims. Having then jurisdiction of that appeal, it has also jurisdiction of the cross-appeal. This has been held by this court.

"Where the appeal is from a decree sufficient in amount to give the court jurisdiction (and the Government appeal is sufficient in amount to give jurisdiction) a cross-appeal will not be dismissed, although it is from a decree awarding against the defendant below less than that amount, as the appeal opened the whole controversy in this court."

Walsh *vs.* Mayer, 111 U. S., 31.

In that case the court, by Mr. Justice Matthews, said:

"We have disposed of the case upon both appeals. The motion to dismiss the cross-appeal of the defendant below, for want of jurisdiction on the ground that the amount in controversy is less than $5,000, is overruled. The cross-appeal it is true, is from a decree awarding against defendants below less than that amount, and it could not therefore be maintained by itself; but the appeal of the plaintiffs below to which it is incident, opened the whole controversy here so far as they were concerned, and that of the defendant must be allowed to have the like effect as to them, so that upon both appeals the case was brought up as it stood for hearing in the court below, the claims of the respective parties involving the question of liability as to the whole amount."

Again, the jurisdiction of this court attached to this case when the Government appealed. On that appeal, where cross-appeal is taken, the whole case is opened as to jurisdiction, and therefore, having once attached, it cannot be taken away by a change in the value of the subject of controversy.

Cook *vs.* U. S., 2 Wall., 218.

In United States *vs.* Ewing, 140 U. S., 150, Justice Brown, in delivering the opinion of the court, uses the following language:

"These are all the items to the allowance of which exception was taken by the Government. It is true that a number of items were objected to by the court below, which upon the authority of The United States *vs.* Jones, 134 U. S., 483, appear to have been properly allowable, but as no appeal was taken by the plaintiff from the disallowance of such items we do not feel at liberty to consider them."

U. S. *vs.* Jones, 147 U. S., 676, item 4.
United States *vs.* Hickey, 17 Wall., 9.

The jurisdiction to hear this cross-appeal being fully established, the items in controversy will be considered.

Item 4. The charge for these oaths is clearly legal. The fee is provided by the fourth clause of section 828 of the Revised Statutes, to wit:

"For administering an oath or affirmation, except to a juror, ten cents."

The findings of fact show that these oaths were administered by order of court. The claimant is therefore entitled to compensation (Van Duzee case, 140 U. S., 177).

The findings of fact further show that the person to whom the oath was administered was *not a juror when sworn*, but the oath was administered to test his qualification to serve as a juror, and that no charge is claimed for oath to a person after he has been accepted as a juror.

These undisputed facts bring the service and charge squarely within the fee bill.

The proof clearly shows that the persons to whom these oaths were administered by order of the court were not jurors either in fact or in law. The oath was administered to them as individuals in order that the court could ascertain from their sworn answers whether they were legally qualified to serve in the capacity of jurors. If they were not qualified and were excused, they certainly were not jurors. Then the oath must have been administered to them as individuals, and the clerk is undoubtedly entitled to his fee. If he is not a juror when excused, it follows, as a legal sequence, that he is not a juror until he has been accepted by the court. But the oath administered by the clerk was administered before the person was accepted by the court, and therefore he was not a juror at that time.

The facts here are identical with those in the Clough case, 55 Fed. Rep., 926, where the facts and the law were thoroughly examined by the court and a judgment rendered for the claimant. It appears no appeal was taken by the United States and the judgment was paid.

While the amount involved is not large, the principle is important to all the clerks of the Federal courts.

Item 9. The charge for drawing this certificate is provided for in the eighth clause of section 828 of the Revised Statutes:

"For * * * making any record, *certificate*, return, or report, for each folio, fifteen cents."

The proof shows that it was the practice of the court for the clerk to issue certified copies of *sci. fa.* for the marshal to serve, and as the paper was a copy of the court process, and to be an official copy it was necessary for the clerk to attach his certificate. The court alone can control its practice of issuing and serving its process, and when the clerk performs a service in obedience to this practice he should be paid for the service. The accounting officers of the Treasury have no legal authority to control this practice in a collateral proceeding by depriving the clerk of compensation for the service. So held in the Jones case, 147 U. S., 675, item 2; Taylor case, 147 U. S., 701.

"If a certified copy is required to be served, the service of a copy not certified is insufficient."

Works on Courts and their Jurisdiction, p. 263.

Item 13. The charge for drawing this certificate is similar to that in item 9 and the facts and the law are identical.

As the service in both items has been approved by the court, and no mistake on the part of the court has been shown by counsel for the Government, the approval is conclusive.

U. S. *vs.* Jones, 134 U. S., 483.

CHARLES C. LANCASTER,
Counsel for Mary K. Wheeler, Adm'x.